

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

CHARLES FERRELL,

Plaintiff,

vs.

Case No. 1994-5581-DM

LINDA ANN FERRELL,

Defendant.

OPINION AND ORDER

Plaintiff Charles T. Ferrell has filed objections to the entry of proposed orders regarding the division of his retirement and/or pension plans.

I. BACKGROUND

Plaintiff filed this action on December 13, 2004 asserting the parties were married November 8, 1982. Three children were born during the marriage, all of whom have now reached the age of maturity.

A *Pro Confesso Judgment of Divorce* entered March 14, 1996 awarded defendant 50% of plaintiff's retirement and/or pension plans with the United Parcel Service, Inc. and United States government. Defendant Linda Ann Ferrell sent proposed orders dividing the retirement and/or pension plans to plaintiff in April 2006.

Plaintiff now objects.

II. ANALYSIS

A. MCR 2.602(B)(3)

As a preliminary matter, plaintiff has not proffered evidence of any prejudice from



defendant's asserted failure to comply with the seven-day rule of MCR 2.602(B)(3). Hence, plaintiff has waived further consideration of this issue.

B. Statute of Limitation

MCL 600.5827 provides:

Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

The general rule is that a claim does not accrue until a right to payment exists. See *Rybinski v Rybinski*, 333 Mich 592, 596; 53 NW2d 386 (1952) ("statute of limitations begins to run against each alimony installment as it becomes due"); *Gutowski v Gutowski*, 266 Mich 1; 253 NW 192 (1934); *Rzadkowolski v Pefley*, 237 Mich App 405, 410; 603 NW2d 646 (1999), citing *Ewing v Bolden*, 194 Mich App 95, 99; 486 NW2d 96 (1992) ("the ten-year period of limitation began to run against each [child support] payment when that payment became due") and *Gabler v Woditsch*, 143 Mich App 709, 711; 372 NW2d 647 (1985) (under the August 1968 divorce decree, balance of property settlement became due in July 1975; hence, plaintiff's claim accrued in July 1975 and his June 1983 complaint was timely filed within the applicable ten-year period).

Indeed, the *Gutowski* Court is particularly instructive:

On May 17, 1921, the superior court...granted a decree of divorce to Marie Gutowski against Arthur Gutowski...ordering him to pay the sum of \$30 each and every week...as alimony for the support of herself and minor child. * * * At the time of trial, plaintiff limited her claim to \$2,180, constituting alimony at \$30 a week for the period of slightly over the 72 weeks just prior to June 15, 1931, when the present suit was begun. She recovered a judgment for this amount and costs.

Defendant contends that plaintiff is precluded from bringing this suit because it was not instituted until more than 10 years after the date of the original decree. This claim is untenable. A decree of divorce does not become outlawed in 10 years. The delinquent installments of alimony...all accrued within two years prior to the beginning of the present suit and therefore, were not outlawed.

Gutowski, supra at 2.

While none of these cases are specific to the filing of proposed qualified domestic relations orders (“QDROs”) more than ten years after the entry of a divorce judgment, the same rationale would apply. Defendant would not suffer a wrong until such time as she was denied her share of plaintiff’s retirement and/or pension benefits, benefits that are not even be due until plaintiff retires. Hence, the statute of limitation on defendant’s claim for retirement and/or pension benefits would not accrue until plaintiff begins receiving his retirement and/or pension benefits and defendant did not receive her share. On this line of reasoning, *Jordan v Jordan*, 147 SW3d 255, 257, 261-263 (Tenn App, 2004) is most persuasive:

Deborah L. Jordan (“Wife”) filed a proposed “qualified” domestic relations order (“QDRO”) with the trial court clerk more than 10 years after her divorce from Walter B. Jordan (“Husband”). The trial court entered the proposed QDRO. Husband filed a motion for relief from judgment, arguing that the entry of the proposed QDRO was barred because Wife failed to act “within ten (10) years of the entry of [the] judgment contained in the Final Decree of Divorce,” citing Tenn. Code Ann. § 28-3-110 (2000).^[1] The trial court granted Husband’s motion and set aside the previously-entered QDRO. Wife appeals, arguing that the ten-year statute of limitations does not apply to the filing of a proposed QDRO because, according to her, such a filing is not an action to enforce a judgment. We agree with Wife’s position. Accordingly, we reverse the judgment of the trial court.

* * *

In the instant case, the judgment of divorce “create[d]” Wife’s right to receive benefits under Husband’s plan. *See generally* 29 U.S.C. § 1056(d)(3)(B)(i)(I). The proposed QDRO simply “recognizes” that right. *See generally id.* However, until the plan administrator approves Wife’s proposed QDRO, her right to receive benefits under Husband’s plan, even though set forth in a validly-entered judgment of divorce, is not enforceable under ERISA. * * *

In *Duhamel v. Duhamel*, 188 Misc. 2d 754, 729 N.Y.S.2d 601 (N.Y. Sup. Ct. 2001), a New York supreme court was faced with a question not dissimilar to the one before us. The parties in *Duhamel* were divorced on December 19, 1986. *Duhamel*, 188 Misc. 2d at 754, 729 N.Y.S.2d at 601. The judgment of divorce incorporated the separation agreement, which recognized the former wife’s right to receive a portion of her former husband’s retirement benefits and granted the

¹The language of Tenn Code Ann § 28-3-110 mirrors that of MCL 600.5809(3).

former wife a proposed QDRO with respect to those benefits. *Duhamel*, 188 Misc. 2d at 754-55, 729 N.Y.S.2d at 601-02. Some fourteen years after the judgment of divorce, "after learning of the [former husband's] imminent retirement," the former wife "sought entry of the proposed QDRO". *Duhamel*, 188 Misc. 2d at 755, 729 N.Y.S.2d at 602. The former husband contended that his former wife's "request to have [the] Court enter a QDRO more than fourteen years after the entry of the parties' judgment of divorce is barred by the[] [applicable six-year] statutes of limitations." *Id.*

The court in *Duhamel* concluded "that the entry of the [proposed] QDRO is governed by [the applicable statute of limitations]"; however, the court emphasized that the "limitation period does not begin to run until a cause of action or claim has accrued." *Id.* In *Duhamel*, the court determined that "since [the former wife's] right to receive a distribution under the [former husband's] retirement plan did not accrue until after her former husband reached pay status, the [applicable statute of limitations] . . . did not begin to run until his retirement date." *Id.* 188 Misc. 2d at 756, 729 N.Y.S.2d at 603.

In subsequent litigation involving the Duhamels, the same New York Supreme Court characterized "an action to compel entry of QDRO" as one "to compel the other [spouse] to perform a mere ministerial task necessary to distribute funds previously allocated by the parties' own binding agreement." *Duhamel v. Duhamel*, 194 Misc.2d 100, 101, 753 N.Y.S.2d 673 (N.Y.Sup.Ct. 2002).

We agree with the result reached in the first *Duhamel* decision. * * *

The plan administrator in the instant case has yet to approve the proposed QDRO. Hence, the trial court's decree cannot be enforced against the "holder of the purse strings." Any attempt to "enforce" the trial court's validly-entered division of Husband's pension plan would be futile. We conclude from all of this that the approval of the proposed QDRO is adjunct to the entry of the judgment of divorce and not an attempt to "enforce" the judgment. It is an essential act to bring to fruition the trial court's decree regarding a division of Husband's interest in the Dupont pension plan. Until the proposed QDRO is approved by the plan administrator and entered by the trial court, the act of the trial court in dividing the pension plan is *not complete and hence not enforceable*. It can be accurately described as inchoate in nature. It follows that Wife's attempt to obtain the approval of the plan administrator of the proposed QDRO and the entry of that order is not an action to enforce the divorce judgment, and hence is not barred by the ten-year statute of limitations. [Emphasis original.]

Therefore, defendant is not time barred from seeking entry of orders implementing her right to a share of plaintiff's retirement and/or pension plans.

C. Terms

The *Pro Confesso Judgment of Divorce* provides in pertinent part:

IT IS FURTHER ORDERED AND ADJUDGED that, except as otherwise provided in this Pro Confesso Judgment of Divorce...each of the parties hereto hereby forever relinquishes all rights and interest in any pension, profit sharing, annuity, or retirement benefits, or any accumulated contributions in any pension, profit sharing, annuity or retirement system, as well as any rights or contingent rights to unvested pension, profit sharing, annuity, or retirement benefits that the other shall have accrued and each of the parties hereto shall hold such rights and benefits free and clear of any such claims which are expressly terminated by the Pro Confesso Judgment of Divorce.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant, Linda Ferrell, is awarded, as an alternate payee under a Qualified Domestic Relations Order, a 50% interest in the benefits due Plaintiff pursuant to his retirement and/or pension plan with United Parcel Service, Inc. and the United States government as of the date of entry of this Pro Confesso Judgment of Divorce plus any increases or decreases in the value of that allotted share after that date. * * *

IT IS FURTHER ORDERED AND ADJUDGED that the parties shall execute such Qualified Domestic Relations Orders in order to effectuate the intent of this provision....

IT IS FURTHER ORDERED AND ADJUDGED that until such time as said QDROs are accepted and implemented by the administrator of the plan in question, Plaintiff, Charles Ferrell, shall maintain Defendant, Linda Ferrell, as beneficiary of any pre-retirement or post[-]retirement survivorship options, and/or as the beneficiary of those funds under Plaintiff's will or estate plan, to the extent of the alternative payee's proportionate interest is awarded in this judgment.

In *Quade v Quade*, 238 Mich App 222, 224-226; 604 NW2d 778 (1999), the court stated:

[T]his Court has held that separate and distinct components of pension plans must be specifically awarded in a judgment of divorce in order to be included in a QDRO. In *Roth v Roth*, 201 Mich App 563, 569; 506 NW2d 900 (1993), this Court held that the right of survivorship in a pension plan will not be extended to a divorced spouse unless it is specifically included as part of the pension award in the judgment of divorce. Similarly, early retirement benefits are a separate and distinct component of defendant's pension plan that were not specifically included in plaintiff's property settlement in the judgment of divorce.

* * *

Moreover, following the specific pension awards for each party, the judgment of divorce states, "IT IS FURTHER ORDERED that each party waives any and all interest in any IRA, Pension or Profit Sharing Plan, in which the other may have an interest, except as specifically provided for herein." This provision would apply to defendant's unvested early retirement benefits and effectively waives any and all interest plaintiff may have had in those benefits.

1. Proposed QDRO

The language awarding defendant 50% of the retirement and/or pension benefits due

plaintiff as March 14, 1996 "*plus any increases or decreases in the value of the allocated share after that date*" would result in a coveture fraction in which the numerator is the number of months of credited service during the marriage and the denominator is the total number of months of credited service at the time of plaintiff's retirement. The subject clause envisioned an increased share rather than a frozen valuation.

Under the plain language of the *Pro Confesso Judgment of Divorce*, defendant is entitled to 50% of the retirement and/or pension benefits due plaintiff under his retirement and/or pension plans. The record is devoid of any evidence as to the terms of such plans. Hence, it is unclear if defendant has the ability to elect to commence receiving her share of retirement and/or pension benefits when plaintiff reaches the "earliest retirement age" or must wait until plaintiff begins receiving such benefits.

Plaintiff does not dispute defendant's right to receive a survivorship benefit. Defendant will receive the survivorship benefit as calculated by the retirement and/or pension plans, which may or may not utilize a separate interest method.

Plaintiff correctly notes defendant is limited to receiving 50% of his regular benefits paid under the retirement and/or pension plans. Defendant shall receive such benefits whether characterized as normal retirement, early retirement, disability retirement or other retirement when plaintiff begins receiving such benefits. Defendant is not entitled to a share of any early retirement subsidies or supplements, interim supplements, early retirement windows or incentives but would retain a right to temporary benefits. *Quade, supra*. Defendant would also be entitled to cost-of-living adjustments and plan improvements or enhancements under the language awarding her any increases in the value of her share.

3. Proposed Qualifying Court Order

Plaintiff is obviously represented by counsel. He also signed the *Pro Confesso Judgment of Divorce*. However, he is not apparently raising the Service members Civil Relief Act, 50 USC App 501 *et seq.*, as a bar to these proceedings.

The issues of the proper division date, commencement date and adjustments are discussed *supra* and need not be addressed again.

Plaintiff has proffered his Service History in support of his calculation of his 'retirement points'.² The parties were married for 313 days of the 365 days between September 17, 1982 and September 16, 1983 or 86% of that time period; they were also married for 179 days of the 366 days between September 17, 1995 and March 14, 1996 (1996 being a leap year) or 49% of that time. Adjusting the retirement points for these time periods (86% of 133 points is 114 points and 49% of 151 points is 74 points) and adding the retirement points for the remaining twelve years would result in 1,402 retirement points having been earned during the marriage.

The pension and retirement benefit provision of the *Pro Confesso Judgment of Divorce* referred to QDROs being entered with respect to each retirement and/or pension plan. Plaintiff's military retirement is one such plan. The language awarding defendant a survivorship benefit used similar terminology. While the nomenclature may be incorrect with respect to plaintiff's military pension (a qualified court order being required for division rather than a QDRO), the intent to award survivorship benefits to defendant is clear. It is axiomatic that such a right is dependent upon the availability of such an election under the military pension plan.³

IV. CONCLUSION

For the reasons set forth above, plaintiff Charles T. Ferrell's objections to the entry of

²No explanation of the form is provided. It is unclear why his total points and apparent retirement points are, except in one instance, different.

³In any event, defendant would be protected by having an interest in plaintiff's will or estate to the extent of her share.

proposed orders dividing retirement and/or pension plans are:

A. DENIED, in part, under MCR 2.602(B)(3);

B. DENIED, in part, with respect to the running of the statute of limitation under MCR 600.5809(3) and

C. GRANTED, in part, and DENIED, in part, with respect to the terms of the proposed orders as delineated above.

Defendant Linda Ann Ferrell shall procure a new proposed QDRO and qualified court order consistent with these holdings and present them under MCR 2.602(B)(3).

This *Opinion and Order* neither resolves the last pending claim in this matter nor closes the case. MCR 2.602(A)(3).

IT IS SO ORDERED.

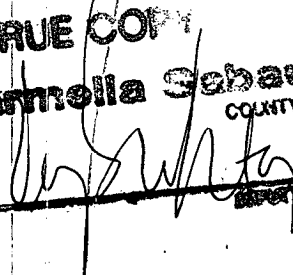
MARK S. SWITALSKI

Mark S. Switalski, Circuit Judge

MSS/vs

Dated: August 2, 2006

Cc: Renee D. Tegel, Attorney at Law
Jacob M. Femminineo, Jr., Attorney at Law

A TRUE COPY
Carmella Gebaugh
COUNTY CLERK
BY 
AUG 2 2006